IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 515 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES; 3 to 5 NO**

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MULCHANDBHAI BECHARBHAI PARMAR - Applicant(s)
Versus
STATE OF GUJART - Respondent(s)

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Appearance :
MR VIPUL S MODI for Applicant(s) : 1,
MR IM PANDYA ADDL PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 16/03/2007

ORAL JUDGMENT :

1. Invoking the provisions of Article 227 of the Constitution and Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code"), the petitioner has called into question the

judgment and order dated 5.3.1994 of learned Additional Sessions Judge, Palanpur in Criminal Appeal No.3 of 1992 wherein, while allowing the appeal of the petitioner and setting aside the order of conviction and sentence, retrial not only of the offence punishable under section 498A of the Indian Penal Code, 1860 (for short "the IPC"), for which the petitioner was already convicted, but for the offence punishable under section 306 of the IPC was ordered with the direction to charge the petitioner for those offences and commit the case for trial by the Sessions Court.

2. The criminal case arose out of death of the wife of the petitioner after more than ten years of married life and birth of two children and, even as the petitioner was charged for and convicted of the offence under section 498-A of the IPC, the appellate court came to the conclusion that, *prima facie*, the deceased appeared to have committed suicide abetted by the petitioner and, therefore, the petitioner was required to be charged and tried for the offence punishable under both the sections.

3. It was submitted by learned senior counsel Mr.B.B.Naik, appearing for the

petitioner, that a serious error of law was apparent on the face of the impugned judgment insofar as in the appeal filed by the petitioner against his conviction and sentence, the aforesaid direction for retrial with additional charge of the offence punishable under section 306 of the IPC was clearly unwarranted and without jurisdiction. He submitted that the impugned judgment, as far as it set aside the conviction and sentence for the offence punishable under section 498-A of the IPC, was not challenged by the petitioner, but the further direction to try the petitioner again for the offence punishable under section 498-A and for the offence punishable under section 306 was challenged. He fairly conceded that conviction for the offence under section 498-A was not set aside on merits or on re-appreciation of evidence but was set-aside only with a view to ordering retrial of the same offence along with the offence punishable under section 306 of the IPC. He submitted that, in an appeal from conviction, the appellate court had, under the provisions of section 386 clause (b) of the Code, power to order retrial by the court of competent jurisdiction but did not have jurisdiction or power to try the convict for another more serious offence. In support of that argument, he relied upon judgment of the Supreme Court in ***State of***

Andhra Pradesh v. Thadi Narayana [AIR 1962 SC 240], wherein the following observations were made:

> *"7. In our opinion, S.423 (1) (b)(i)* is, therefore, clearly confined to cases of appeals preferred against orders of conviction and sentence, and the powers exercisable under it are therefore conditioned by the said consideration. It is impossible to accede to the argument that the powers conferred by this clause can be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged in dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved...."*
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> *(* pari materia provisions of the old Code of 1898)*

In the facts of the above case, neither the respondent nor the pleader had given notice under section 439 (2) of the Code (old Code of 1898) and even the advocate appointed *amicus curiae* did not know, much less the respondent herself, that the learned judge intended to exercise his powers under section 439 against the respondent in respect of the offences under sections 302 and 392 despite the fact that the appellant therein had not preferred an appeal against the order of acquittal passed in favour of the respondent on those grounds. The Supreme Court held that the scheme of section 423 itself

clearly showed that when appeals against conviction are brought before the appellate court by the convicted person, it is only the orders of conviction and matters incidental thereto that fall to be decided by the appellate court. It was observed that, *prima facie*, if an order of acquittal was not challenged by an appeal and if no action were taken by the High Court under section 439 (old), the order of acquittal becomes final and cannot be impugned indirectly by the State in resisting an appeal filed by a convicted person against his conviction.

4. On the basis of the above observations of the Supreme Court, it was vehemently argued by Mr.Naik that, as far as the offence punishable under section 306 of the IPC was concerned, the petitioner was never charged with that offence and, therefore, he was on a better footing than a person acquitted of the charge under that section. Then, that charge cannot be newly introduced in his appeal preferred from his conviction without so much as notice or invocation of revisional jurisdiction of the appellate court. He further submitted that the incident of untimely death of the petitioner had happened 22 years ago and, at the ripe old age, the petitioner was required to be relieved of the litigation which may not serve any purpose.

5. Learned A.P.P. Mr.I.M.Pandya submitted that the appellate court had plenary powers of ordering retrial and the petitioner cannot take shelter of the plea of double jeopardy. He, however, fairly conceded that the impugned order and pendency of the present petition for 12 years had resulted into a situation where the petitioner had escaped punishment without being acquitted on merits of even the offence punishable under section 498-A of the IPC.

6. It was seen on perusal of the judgment of the trial court that, after detailed discussion of evidence on record, the petitioner was convicted for the offence punishable under section 498-A of the IPC and sentenced to two years of rigorous imprisonment with fine of Rs.500/- and one month of simple imprisonment in case of default. After that order dated 7.2.1992, by the impugned order in appeal, the aforesaid order was set aside without so much as recording and dealing with the grounds of appeal and straightaway assuming on *prima facie* basis that charge for the offence punishable under section 306 of the IPC was required to be framed. Therefore, Mr.Naik was right in submitting that the appeal of the petitioner was not decided on merits and the appellate court had failed to

exercise its jurisdiction. On the other hand, admittedly, no revision or appeal was filed by the State and no notice or opportunity of hearing was given to the petitioner to show cause why retrial should not be ordered for trying him for the offence punishable under section 306 of the IPC. Thus, a serious error apparent on face of the record resulting into miscarriage of justice appears to have been committed in deciding the petitioner's appeal. Since the petitioner has invoked the jurisdiction of this court under Article 227 of the Constitution and section 482 of the Code, it would not be proper for this court to call for the record and, after re-appreciation of evidence, decide the appeal of the petitioner on merits.

7. Therefore, the impugned judgment and order is required to be set aside with the direction to hear the appeal afresh and decide the same in accordance with law after giving to the parties an opportunity of being heard. Although it cannot be laid down as an absolute proposition that under no circumstances a retrial can be ordered with a suggestion to alter the charge, such contingency would arise only in cases of exceptional nature but such order would not be made without notice to other side. Accordingly, the petition is partly allowed, and

the impugned judgment and order is set aside with the direction to restore Criminal Appeal No.3 of 1992 and hear and decide the same in accordance with law as expeditiously as practicable preferably within a period of three months. Rule is made absolute accordingly with no order as to costs.

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)